92-526

Supreme Court, U.S.
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No. 92-

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

ONE PARCEL OF REAL PROPERTY LOCATED AT 456 CAFFERTY ROAD, TINICUM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, etc., et al.,

Petitioners,*

v.

UNITED STATES OF AMERICA,

Respondent.

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
JAMES H. FELDMAN, JR.
PAMELA A. WILK
The Ben Franklin, Suite 400
Chestnut Street at Ninth
Philadelphia, PA 19107

(215) 923-1300

Attorneys for Petitioner*

*Full listing of petitioners and counsel on inside cover.

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Full listing of petitioners:

ONE PARCEL OF REAL PROPERTY LOCATED AT
456 CAFFERTY ROAD, TINICUM TOWNSHIP,
BUCKS COUNTY, PENNSYLVANIA, AND ALL
IMPROVEMENTS AND APPURTENANCES THEREON;
ONE KEOUGH ACCOUNT/CERTIFICATE OF DEPOSIT
IN THE NAME OF MARK A. WALYNETZ AT BUCKS
COUNTY BANK AND TRUST COMPANY;
and MARK A. WALYNETZ

Of Counsel for Petitioners:
ROBERT E. MADDEN
1401 Walnut St., suite 300 Chestnut
Street at Ninth
Philadelphia, PA 19102

(215) 568-3331

QUESTIONS PRESENTED

1. Is hearsay evidence admissible to satisfy the government's burden of showing probable cause for the in rem forfeiture of real and personal property said to be traceable to the proceeds of drug transactions?

2. Under 21 U.S.C. § 881(a)(6), providing for the in rem forfeiture of interests in property traceable to the proceeds of drug transactions, is probable cause for forfeiture of the entirety of a parcels of real estate and a bank account established by evidence showing no more than that the purchaser was engaged in the marijuana business at or prior to the time of the purchases and may have had sufficient tainted income to fund the entire purchases?

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REASONS FOR GRANTING THE WRIT

1. The decision below, like those of the other circuits which it follows, contravenes the plain language of the Federal Rules of Evidence in assuming uncritically and erroneously that hearsay is admissible

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LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties -- the real estate, the bank account, the claimant (Mark A. Walynetz) and the United States. Bucks County Bank and Trust Company also made a claim in the district court, which was sustained. The Bank was not a party to the appeal and is not a party to this petition.

to satisfy the government's burden to establish probable cause for an *in rem* forfeiture. 26

2. The Court should also grant certiorari to establish that probable cause to believe that property is traceable to the proceeds of drug trafficking cannot be established merely by showing that a purchaser was in the drug business at the time of the purchase, and to establish that in any event property is forfeitable under 21 U.S.C. § 881(a)(6) only to the extent that a part of its value can actually be traced to drug profits. 40

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ONE PARCEL OF REAL PROPERTY LOCATED AT 456 CAFFERTY ROAD, TINICUM TOWNSHIP, BUCKS COUNTY, PENNSYLVANIA, AND ALL IMPROVEMENTS AND APPURTENANCES THEREON; ONE KEOUGH ACCOUNT/CERTIFICATE OF DEPOSIT IN THE NAME OF MARK A. WALYNETZ AT BUCKS COUNTY BANK (& TRUST) COMPANY; and MARK A. WALYNETZ respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 24, 1992, and the memorandum opinion filed that day, as amended August 6, 1992, affirming the in rem forfeiture of the petitioner real property and the petitioner Keough account to the United States, and rejecting the claim of petitioner Mark A. Walynetz.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Third Circuit, filed on June 24, 1992, which was amended on August 6, 1992, is not to be published. It is Appendix B to this petition. The post-trial Memorandum Opinion and Order of the district court (Weiner, J.), which is not published, is dated October 22, 1991; it is available on WestLaw, at 1991 WL 224616. The Memorandum was filed October 23, and the Order was entered as a judgment October 24, 1991. A copy is Appendix C. The prior opinion of the district court (Ludwig, J.) denying summary judgment is not published, but is available at 1991 WL 127061 (E.D.Pa., filed July 10, 1991).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 24, 1992. Appendix A. This petition is filed within 90 days of that date. Rule 13.1 (1990 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULE INVOLVED

The Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended by the Title III of the Psychotropic Substances Act of 1978, provides, in pertinent part:

§ 881. Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or

intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

* * * *

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; ... shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof ....

21 U.S.C. § 881(a)(6),(7), (d).

Part V of Title IV of **the Tariff Act of 1930**, as amended, provides, in pertinent part:

§ 1615. Burden of proof in forfeiture proceedings

In all suits or actions ... brought for the forfeiture of any vessel, vehicle, aircraft, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; ... Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boarded or required to come to a stop or seized a vessel, vehicle, or aircraft, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

(2) Marks, labels, brands, or stamps, indicative of foreign origin, upon or accompanying me[r]chandise or containers of merchandise, shall be prima facie evidence of the foreign origin of such merchandise.

(3) The fact that a vessel of any description is found, or discovered to have been, in the vicinity of any hovering vessel and under any circumstances indicating contact or communication therewith, whether by proceeding to or from such vessel, or by coming to in the vicinity of such vessel, or by delivering to or receiving from such vessel any merchandise, person, or communication, or by any other means effecting contact or communication therewith, shall be prima facie evidence that the vessel in question has visited such hovering vessel.

19 U.S.C. § 1615.

The **Federal Rules of Evidence** provide, in pertinent part:

> **Rule 1101. Applicability of Rules.**
>
> * * * *
>
> (b) Proceedings generally.--These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.
>
> * * * *
>
> (d) Rules inapplicable.--The rules (other than with respect to privileges) do not apply in the following situations:
>
> (1) Preliminary questions of fact.--The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104.
>
> (2) Grand jury.--Proceedings before grand juries.
>
> (3) Miscellaneous proceedings.--Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

> (e) Rules applicable in part.--In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: ... actions for fines, penalties, or forfeitures under part V of title IV of the Tariff Act of 1930 (19 U.S.C. 1581-1624), or under the Anti-Smuggling Act (19 U.S.C. 1701-1711); ....

Fed.R.Evid. 1101.

STATEMENT OF THE CASE

This petition arises from an action in rem seeking forfeiture of the petitioner Walynetz's home and retirement account on the theory that they were acquired with the proceeds of marijuana transactions. Petitioner himself was never charged with any related criminal offense.

a. Procedural History

After a nonjury trial in the United States District Court for the Eastern

District of Pennsylvania (Senior U.S. District Judge Charles R. Weiner, presiding), petitioner real estate and bank account were ordered forfeited to the respondent United States, over the claim of petitioner Walynetz (hereinafter referred to simply as "petitioner"). The government filed its complaint on December 15, 1989, alleging forfeiture of the petitioner real property pursuant to 21 U.S.C. § 881(a)(6). Petitioner filed a claim for return of the property, and an answer to the complaint. Bucks County Bank and Trust Company ("the bank") also filed an answer and claim. An amended complaint (and then a second amended complaint), adding allegations against the petitioner bank account,[1] and amended

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1. The respondent also later added a claim for forfeiture under 21 U.S.C. § 881(a)(7) (use of property to facilitate drug transactions), but this contention was not sustained at trial, and the respondent did not pursue it on appeal. However, on appeal the respondent did

answers and claims were filed.

In interrogatories and at his deposition, petitioner invoked his privilege under the Fifth Amendment to the United States Constitution and refused to give any specific information regarding the sources of his income. Petitioner answered the Government's request for the production of documents relating to his alleged sources of income by responding that he has no documents responsive to the Government's request. Cross-motions for summary judgment were denied. United States v. One Parcel of Real Property, 1991 WL 127061 (E.D.Pa.,

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attempt to assert for the first time that the forfeiture verdict could be sustained under 18 U.S.C. § 981 (money laundering). Presumably because that provision and the criminal statutes it implements post-date the underlying conduct involved in this case, the court of appeals did not address that contention in its opinion.

filed July 10, 1991) (Ludwig, J.). The petitioner filed a trial brief objecting to the use at trial of hearsay evidence to satisfy the respondent's probable cause burden.

A two-day, nonjury trial was held October 2-3, 1991. On October 23, Judge Weiner filed his Memorandum Opinion and Order entering judgment for the United States and against the petitioner, subject to the claim of the bank, which was sustained. Appx. C. In its opinion, notwithstanding the petitioner's objection, the district court relied upon the hearsay affidavit of an FBI agent to support the respondent's case. Appx. C-17. On appeal, the Third Circuit affirmed, Appx. A, with a not-for-publication Memorandum Opinion holding that the respondent had established probable cause, based in part on the

objected-to hearsay, to believe that the petitioner properties were acquired and improved with proceeds traceable to an exchange for controlled substances, and that the petitioner-claimant had not sustained his burden of proving the contrary. Appx. B. By Order dated August 6, 1992, the court of appeals stayed its mandate pending the timely filing of this petition. Appx. D.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The district court's jurisdiction was properly invoked in this case under 28 U.S.C. §§ 1331, 1345, and 1355, in that the complaint was brought by the United States under federal law and sought a forfeiture. The jurisdiction of the court below rested upon 28 U.S.C. § 1291 and was timely invoked by Notice of Appeal filed within

60 days of the entry of judgment. Fed.R.App.P. 4(a)(1) (U.S. party).

b. Statement of Facts

From 1979 to 1984, petitioner Mark A. Walynetz (hereinafter simply "petitioner") was the partner of Robert David Broff in a marijuana distribution business. The partnership bought marijuana on consignment, initially receiving shipments of 50 to 100 pounds two to three times each month. In 1980, they began to buy marijuana in larger quantities, receiving two shipments ranging from 700 to 1,000 pounds. They also received two such shipments in 1981 and 1982. In 1983, they received one shipment of 4,000 to 6,000 pounds. In 1984, they received one shipment of 8,000 pounds. The partnership's profits averaged $10 to $50 per pound, depending on the market, which Broff and Walynetz

split evenly between themselves. The district court found that each partner's cumulative gross profit from the marijuana business between 1979 and 1984, before overhead, was between $87,000 and $590,000 for the five years in total. The district court did not find that petitioner dealt in marijuana, or any other controlled substance, nor that he received income from that source, after 1984.

Petitioner and Robert Broff acquired the petitioner real property, a parcel located at 456 Cafferty Road, Tinicum Township, Bucks County, Pennsylvania, on September 26, 1980, for a purchase price of $117,000. The property was deeded in the name of a Pennsylvania corporation, Renew Inc. The Pennsylvania Department of State issued a Certificate of Incorporation for Renew Inc. on August 5,

1980. Robert Broff was president of Renew Inc.; Broff's wife Andrea was the corporate secretary. Together, they owned 50% of the stock. Petitioner owned the other 50% and was the corporation's vice-president. Broff and petitioner obtained the petitioner property with a down payment of $30,000 and a mortgage of $83,300 from the Hatboro Federal Savings and Loan Association. Petitioner's portion of the deposit on 456 Cafferty Road came from his personal checking account.[2] The balance due at settlement came from the account of Renew Inc.

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2. Petitioner made the initial payments for the Cafferty Road property in part with personal checks, as follows: 7/30/80, $1,000; 8/8/80, $5,450. The record shows that petitioner and Broff actually put somewhat more than $20,000 each into the closing. The figures in text above, which do not quite add up correctly, are taken from the district court's findings.

During the period from October of 1980 to early 1982, Broff and petitioner made some improvements to the property, including work on one of the floors and work on some cabinets. Each contributed about 50% to the costs of these improvements. For the years 1979 through 1984, drug sales were Broff's primary source of income. Broff was tried, convicted and imprisoned for violating the federal drug laws.[3] Petitioner, on the other hand, has never been prosecuted, much less

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3. Daniel Ring was an employee of a marijuana distribution business owned by Ken Lit. He delivered marijuana to Robert Broff. The deliveries were made to country houses in Bucks County. Payments were made at Lit's house. Deliveries were always made to Broff. Ring testified that petitioner was present at one delivery. In May 1987, Ring pled guilty to one count of interstate drug trafficking and agreed to cooperate with the Federal Bureau of Investigation. Ring testified he told the FBI about petitioner; however, petitioner's name does not appear in the FBI Form 302 containing Ring's information.

convicted, for dealing in marijuana or any other controlled substance.[4]

Broff introduced petitioner to Isaac Abrahams, his accountant. According to the affidavit of FBI Special Agent Albert Sproule, Broff told Sproule that petitioner admitted using Abrahams to falsify his tax returns to create the appearance that petitioner's funds had a legitimate source.[5]

During the period from late 1981 to early 1982, petitioner paid the Br ffs $50,000 for their 50% interest in Renew Inc. Payment was made by three checks

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4. As noted in the court of appeals' decision, he has two minor and unrelated convictions for personal marijuana possession. Appx. B-2 n.1.

5. The district court made this Finding on the basis of hearsay statements contained in Agent Sproule's affidavit, which was offered into evidence by the Government. When he testified in person at trial, Broff denied having made this assertion.

drawn on petitioner's personal checking account. Petitioner told Broff, his partner in the drug business, that he had borrowed these funds from his father.[6] On January 29, 1982, petitioner requested that Hatboro Savings release the Broffs from any further obligation on the mortgage for the property, and Hatboro granted the request. At the time of this transaction the only significant asset owned by Renew Inc. was the property at 456 Cafferty Road, which remains deeded in the name of Mark Walynetz.

Following his purchase of the Renew Inc. stock, petitioner paid for goods,

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6. The district court found as a fact that Walter Walynetz, petitioner's father, loaned or gave his son money on several occasions beginning in 1980. In 1980 he gave his son thirteen cans of silver coins whose face value was $5,400. The fair market value of the silver was $15 per ounce. In 1982, he loaned or gave his son another $21,000.

services and equipment to rebuild and renovate the property. Petitioner hired Lynn Taylor Associates to perform architectural services. Petitioner paid Lynn Taylor Associates $17,294.06, of which the first $7,126.30 was paid in cash. Petitioner hired John Ament to perform carpentry and roofing. He paid Ament between $4,000 and $6,000 in cash for preliminary roofing work before the renovations began. Ament then performed major renovation work at the Cafferty Road property between Fall 1982 and Summer 1983. He received $125,208 for his services, which petitioner paid in cash. Payments were made every two weeks in amounts ranging from $5,000 to $10,000, delivered in an envelope, bag or tennis can. Petitioner hired Superior Wood Craft, Inc., to supply and install kitchen equipment and cabinets at

Cafferty Road for $24,171.21. Upon delivery of the materials, petitioner paid Superior $5,000 in cash; he later made a second cash payment to Superior of $7,000.[7]

On March 30, 1984, petitioner applied for a $100,000 home equity loan, offering the Cafferty Road property as collateral. Bucks County Bank and Trust would not extend the loan unless the property was in petitioner's name, rather than the corporate name. On April 16, 1984, petitioner caused a deed to be recorded with the Bucks County Register of Deeds transferring the property from the name of Renew Inc. to Mark A. Walynetz. The Bank then extended peti-

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7. In June, 1991, petitioner visited the offices of Superior and asked Superior's president to destroy documents relating to his payments and to tell the government that the payments were made by check.

tioner a $100,000 home equity loan. In May 1985, petitioner paid off the original mortgage with checks written on his personal account.

On February 16, 1988, petitioner applied for a business line of credit with Bucks County Bank and Trust Company. Following a review of petitioner's financial statements and tax returns, the Bank extended a $200,000 line of credit, secured by a second position lien on 456 Cafferty Road. On May 10, 1989, petitioner requested and received an increase in his line of credit to $250,000.[8]

The petitioner Keough account (a self-employed person's retirement plan)

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8. The Bank followed its standard policy in reviewing petitioner's loan applications. On this basis, the district court found that the Bank was a good faith lender and innocent lien holder. The court thus sustained the Bank's claim to save its interest from forfeiture, which the government did not appeal.

was originally opened with Butcher and Singer, an investment brokerage firm, and was later transferred to Bucks County Bank and Trust Company. Petitioner made deposits to the Keough account during the time period that the evidence showed him to be dealing in controlled substances, as follows:

Tax Year	Date	Check No.	Amount
1981	6/28/82	412	$11,307.92
1982	4/3/83	215	$13,398.00
1983	4/16/83	317	$15,000.00
1984	6/26/84	340	$ 3,224.00

Petitioner continued to make deposits in the Keough account after the years when the witnesses said he was dealing in marijuana, as follows:

Tax Year	Date	Check No.	Amount
1984	4/10/85	101	$11,776.00
1985	3/17/86	110	$ 5,000.00
1985	3/17/86	701	$ 5,000.00

1985	4/1/86	706	$ 2,000.00
1985	6/15/86	739	$ 3,000.00
1986	4/14/86	104	$11,000.00
1987	3/30/88	958	$16,857.00
1988-89	4/31/89 wire transfer		$15,000.00

Peter Walynetz, petitioner's brother, was involved with petitioner in various businesses. The district court credited Peter Walynetz's testimony that just prior to the beginning of petitioner's marijuana dealing with Broff, he was involved in a business on South Street in Philadelphia called Grumbles, a used clothing store. Petitioner sold his interest in Grumbles in 1979 for $50,000. From 1985 to 1988, petitioner and his brother were in the used car business. In 1987, petitioner performed promotional services for a hair salon, for which he was paid $5,000. Petitioner also sold

hot tubs, buying wooden tanks for $50 apiece and selling them for several thousand dollars. In addition, petitioner sold two properties in 1989, each for a sale price of $143,500.

Petitioner presented evidence, which the district court credited, showing that in 1985 petitioner's father loaned his son $80,000. One check, in the amount of $70,000, went to pay off the mortgage on the petitioner Cafferty Road property. In 1988 the elder Mr. Walynetz also gave his son the check he received from the sale of his principal residence, as an investment in 456 Cafferty Road.

Augustine J. Manson, a certified public accountant, was qualified at trial as an expert witness. He reviewed petitioner's income tax and bank records for the period 1977 through 1988, to ascertain what funds were available for

petitioner's use during these years. His testimony was to the gross amounts available, without any deduction for loan repayments, business expenditures or personal expenses. The amounts he testified to included income from businesses, as ascertained from tax returns adding back depreciation, as well as loans and gifts petitioner received during this period. He testified that petitioner had the following amounts available:

YEAR	GROSS AMOUNT AVAILABLE
1977	$ 26,996
1978	$ 38,604
1979	$ 50,352
1980	$132,356
1981	$ 77,650
1982	$171,896
1983	$136,959
1984	$412,177
1985	$209,491
1986	$107,413
1987	$613,716
1988	$869,165

It was thus the opinion of petitioner's expert, based on the sources he

reviewed,[9] that petitioner had available the cumulative total of $2,846,775 for the period 1977-1988.

REASONS FOR GRANTING THE WRIT

1. The decision below, like those of the other circuits which it follows, contravenes the plain language of the Federal Rules of Evidence in assuming uncritically and erroneously that hearsay is admissible to satisfy the government's burden to establish probable cause for an in rem forfeiture.

The admissibility vel non of hearsay evidence to support an in rem forfeiture is an important and recurring question of federal law which should be, but has not been, addressed by this Court. The question is answered in the Federal Rules

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9. These figures are not the product of a certified audit conducted in accordance with established accounting principles. Rather they are based upon petitioner's unaudited income tax records and several undocumented loans received by petitioner from his father. Manson offered no opinion on the reliability of the information contained in the tax records.

of Evidence, but none of the many decisions of the circuits which purport to address the issue since adoption of the Rules in 1973 even looks to that controlling authority to find the answer. Instead, the cases, like the decision below, merely cite one another, ultimately leading back in the chain of authority to pre-Rules cases which completely fail to support or justify the doctrine. It is past time for this Court to name this house of cards for what it is and uphold the authority of the Court, after scrutiny by Congress, to declare and define the rules of evidence for the federal courts.

Petitioner objected, in a four-page trial brief, to the admission of FBI Agent Sproule's affidavit as evidence at trial in support of the respondent's effort to meet its burden of showing

probable cause to believe that the property at issue was entirely traceable to the proceeds of drug transactions. Sproule's affidavit is an 11-page summary of his investigation, including numerous statements attributed to Broff which purport to relate incriminating admissions of the petitioner. Much of the information contained in the Sproule affidavit was not testified to at trial, either by Sproule or by Broff. The trial court took that motion under advisement, but obviously overruled it (although the record contains no explicit ruling), because it relied on the affidavit on one critical point in contradiction of the live trial testimony. Appx. C-17. Since the trial court did not credit the live testimony of Broff where it was contradicted by the affidavit, it may reasonably be inferred, as well, that the

district court relied on the affidavit pervasively to corroborate other challenged trial testimony in making its credibility determinations and on that basis to reach its findings.[10]

The admission of the Sproule hearsay affidavit was challenged on appeal. The court of appeals rejected the contention, holding that "The government may establish probable cause for forfeiture by hearsay evidence. United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618[, 621] (3d Cir. 1989)." Appx. B-10. The Third Circuit's Grubb Road decision, in turn, adopts the reasoning and holding of a Ninth Circuit decision, United States v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276, 1283

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10. For this latter reason, at least, error in admitting the agent's affidavit could not be deemed harmless.

(9th Cir. 1983), which the leading treatise touts as containing "the best discussion of the issue." 1 David B. Smith, Prosecution and Defense of Forfeiture Cases ¶11.03[5], at 11-18 n.33 (1992 rev.) (citing several other circuits in accord). As the Yacht Named Tahuna case puts the point, "The question of probable cause depends not upon the admissibility of the evidence upon which the government relies but only upon the legal sufficiency and reliability of the evidence." 702 F.2d at 1283. Accord, Grubb Road, 886 F.2d at 621. For this notion, the Yacht Named Tahuna court cites this Court's leading cases on probable cause for obtaining warrants, and a 1954 decision of the Eighth Circuit.[11]

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11. The Yacht Named Tahuna decision also cites a 1976 Ninth Circuit case and a 1978 Sixth Circuit ruling, but neither of those cases actually addresses the hearsay question.

Those authorities prove nothing relevant. In the search and seizure cases, this Court was only asked to address, and in the cases arising in state courts was only empowered to address, the question whether the Fourth Amendment itself bars the use of hearsay to establish the probable cause required by the Constitution before a warrant may issue. That question always has been answered in the negative. The question whether admissible evidence must be presented to obtain a search warrant as a matter of Fourth Amendment constitutional law, however, has little, if anything, to do with the kind of evidence that must be presented to meet the government's burden of going forward in a particular kind of civil action to which the Federal Rules of Evidence are applicable, that is, an

in rem forfeiture proceeding under 21 U.S.C. § 881(a), which incorporates by reference (id. § 881(d)), the procedural provisions of 19 U.S.C. § 1615.

The earlier Eighth Circuit decision, Ted's Motors, Inc. v. United States, 217 F.2d 777 (1954), while at least a forfeiture case which discusses the admissibility of hearsay, holds only that admissions of the claimant are competent evidence in the government's probable cause case. Admissions of a party, of course, would be allowable evidence even if the hearsay rule did apply, either through the operation of a hearsay exception or for being excluded from the definition of hearsay (as under the Federal Rules); the broader language of that decision about hearsay generally is thus merely dictum. Ultimately, then, the entire chain of authority underlying

the decision below dissolves into emptiness.

More important, the positive law on the subject (unmentioned by the court of appeals here or by any of the other circuit court decisions on the subject) is clear and directly to the contrary of the rulings below. The Federal Rules of Evidence explicitly declare that those rules (including the hearsay rule) "apply generally" in all federal court cases, unless otherwise provided in the rules themselves. Fed.R.Evid. 1101(b). Rule 1101(d)(3), for example, exempts proceedings for the issuance of arrest or search warrants from the operation of the rules of evidence (other than the rules with respect to privileges), but neither that subsection nor any other provision of the Federal Rules exempts forfeiture actions in court. To the contrary, Rule 1101(e)

expressly provides that the rules of evidence do apply to proceedings under "part V of title IV of the Tariff Act of 1930" (which includes 19 U.S.C. § 1615), "to the extent that matters of evidence are not provided for in the statutes which govern procedure therein ...."

Section 1615, the statute which "govern[s] procedure" in forfeiture actions, does contain three special rules of evidence (see full quotation in Statutes Involved, ante), but nothing in the Tariff Act purports to suspend the hearsay rule generally. In effect, that statute places a burden of going forward on the government, to the extent of establishing probable cause (and then the ultimate burden on the claimant of persuasion by a preponderance of the evidence). The use of the term "probable cause" in the statute, in and of itself,

cannot be taken to imply that one kind of evidence or another should be used to satisfy either party's burden to establish a particular level of belief by the pertinent factfinder.[12]

That § 1615, in and of itself, does not make all hearsay admissible, is particularly clear since two of the three evidentiary clauses in § 1615 serve to create special exceptions to the hearsay

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12. It may be true that a person of ordinary caution and prudence, as the Fourth Amendment probable cause cases say, would not be disabled from forming a belief in a proposition simply because it was to be established by hearsay. But that is equally true of any standard of proof. Unless forbidden by the court, a jury might well be persuaded by hearsay to find a proposition to be true on a preponderance of the evidence; indeed, a jury might find such evidence in a particular case to be "clear and convincing" or even to be persuasive "beyond a reasonable doubt." In other words, contrary to the Yacht Tahuna and Grubb Road reasoning, to declare that a given burden or standard of proof applies is never the same as establishing the applicable rules of evidence.

rule in certain limited respects for the purpose of establishing "the place where the act in question occurred," 19 U.S.C. § 1615(1), and "the foreign origin of [certain] merchandise." Id.(2).[13] Had Congress intended the statutory "probable cause" standard to generate an automatic, wholesale suspension of the hearsay rule, it would not have crafted clauses (1) and (2), because these provisions would then be redundant. Instead, the existence of the two specific, unique hearsay exceptions virtually precludes the possibility that the pre-Rules case law holding that hearsay is admissible to prove probable cause at an in rem forfeiture trial, weak as it was, survived the enactment of the

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13. The third special evidence rule does not concern hearsay, but rather creates a rebuttable presumption concerning contact between certain vessels. 19 U.S.C. § 1615(3).

Federal Rules of Evidence.

If the language of the Rule and statute were not clear enough, there is a final reason to reject the conclusion of the courts below on the admissibility of hearsay, namely, to avoid a question of unconstitutionality. As Judge Beam recently elaborated in a thorough and telling exposition, the allocation of burdens in § 1615 may well violate the Due Process Clause of the Fifth Amendment, insofar as it regulates deprivations of property. See United States v. Twelve Thousand, Three Hundred Ninety Dollars, 956 F.2d 801, 807-12 (8th Cir. 1992) (dissent). Judge Beam concludes that the constitutionality of § 1615 can be saved only by construing the statute, inter alia, as forbidding the government from prevailing on the basis of hearsay.

> [D]ivestiture of title should only be possible with evidence admis-

> sible at a trial. Evidence which qualitatively and quantitatively barely meets the threshold for probable cause should never be sufficient to divest title to noncontraband property.

956 F.2d at 808. As Judge Beam explains:

> [T]he interest at stake, private property, is one that has always had enormous importance in our society. From its inception, the Constitution recognized the importance of private property as a concomitant to liberty. ... 'Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. [226,] 236 [(1897)]; see also Charles A. Reich, The New Property, 73 Yale L.J. 733, 771-74 (1964) .... To deprive an individual of property is to deprive him of a measure of his autonomy and limits his ability to interact with and in society. As Justice Kennedy has stated, 'any system that wishes to protect freedom has to protect property.' 6 Newsletter of the Comm'n on the Bicentennial of the U.S. Constitution, No. 3, at 1 (1990).

Id. at 810-11.

Judge Beam's analysis directly ties the constitutional problems with § 1615 to the case law tolerating reliance on hearsay to establish probable cause for forfeiture.

> The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.

Id. at 811. Judge Beam concludes that under a proper construction of the statute, the "government need not establish [its case] by a preponderance of the evidence, but the facts adduced would have to meet the requirements of the federal rules of evidence." Id. at 812. That is the result mandated by the terms of the Rules themselves, as well as by the Due Process Clause.

For these reasons, this Court should grant this petition for certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit, remanding for a new forfeiture trial at which hearsay evidence is held inadmissible.

2. The Court should also grant certiorari to establish that probable cause to believe that property is traceable to the proceeds of drug trafficking cannot be established merely by showing that a purchaser was in the drug business at the time of the purchase, and to establish that in any event property is forfeitable under 21 U.S.C. § 881(a)(6) only to the extent that a part of its value can actually be traced to drug profits.

As applied to a forfeiture action under 21 U.S.C. § 881(a)(6), the "probable cause" test of 19 U.S.C. § 1615 means probable cause to believe that some or all of the value of the property in question can be traced to the proceeds of an exchange for a controlled substance.

This Court should also grant certiorari in this case to resolve different approaches in the Circuits to determining when the government has met its initial burden with respect to less than all of the value of an item of property which is said to be forfeitable under (a)(6).

The respondent's case at trial demonstrated without question that a substantial part of the value of the property on Cafferty Road was traceable to the proceeds of marijuana sales. Broff himself testified that he funded his 50% of the down payment with marijuana profits. Likewise, the percentage of present value represented by the improvements to the property paid for with thousands of dollars in unexplained cash during the years that Broff testified petitioner was a marijuana dealer could be held, on a probable cause

standard, to be forfeitable. Nor do we contest, at this stage of the case, that the evidence at trial reached the probable cause level for some of the earlier deposits into the Keough account.

But there was nothing rising above suspicion to justify forfeiture of the balance of either the real estate or the bank account. On the evidence presented in the government's initial case, petitioner's share of the down payment, paid from his personal checking account in his own name, was at least as likely to represent an investment of the $50,000 he received from the sale of his clothing business as it was to represent drug money. Nothing at all was shown to justify a conclusion of taint with respect to the funds used to build equity by making the mortgage payments, nor the money used in 1985 to pay off the

mortgage. Nor was there any basis to find probable cause with respect to that part of the Keough account which represented post-1984 deposits.

The decision below, in keeping with the Eleventh Circuit but in contrast with the approach of the First and Fifth, disregarded the language of § 881(a)(6) which authorizes forfeiture only of that part of the property which is "traceable" to the proceeds of drug trafficking. See Jt. Explan. Smt., 124 Cong. Rec. S17647, reprinted in 7 U.S.C. Cong. & Admin. News 9518, 9522 (1978) ("if such proceeds were, for example, commingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form: they would still be subject to forfeiture, but only to the extent that it could be shown that a traceable connection to an illegal transaction in

controlled substances existed"). The partial forfeiture aspect of § 881(a)(6) is made even more clear by contrasting it with the terms of § 881(a)(7) (see Statutes Involved ante), which explicitly calls for the forfeiture of the whole of any lot of which part is used to facilitate a drug violation.[14]

Contrary to the assertion of the court of appeals, petitioner did not argue, and does not contend, that the government must tie the property to the proceeds of a particular, identifiable drug transaction. Compare Appx. B-5 to -6. However, the standard adopted by the court below is much too lax to comply with the statute:

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14. The respondent's initial claim for forfeiture of the real estate under (a)(7) in this case was not sustained by the district court, that claim having failed for complete lack of evidence.

> In determining whether probable cause exists for forfeiture,
>
> > all that is required is that a court be able to look at the 'aggregate' of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions. (Citation omitted.)
>
> United States v. A Parcel of Land Known as 92 Buena Vista Avenue, 937 F.2d 98, 104 (3rd Cir. 1991).
>
> Thus, under the drug forfeiture statute, 21 U.S.C. § 881, the government is only required to show a reasonable ground for belief that there was an unlawful drug transaction and a substantial connection between the transaction and the property subject to forfeiture.

Appx. B-6.[15] The totality of the court of appeals' demonstration that petitioner's home could be forfeited under this standard is as follows:

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15. The court of appeals' use of the expression "substantial connection" to imply that only a low standard need be met is ironic, as that phrase is taken from a sentence in the legislative history which is making the opposite point. See Jt. Explan. Smt., supra.

BEST AV

> In light of the substantial evidence presented by the government of Walynetz' drug involvement (including marijuana transactions of up to 7,000 pounds per shipment) the district court did not err by finding a substantial connection between his elicit [sic] drug activity and the house he purchased and the Keough account he funded.

Appx. B-6 to B-7. The district court's analysis was similarly limited to statements that petitioner was in the marijuana distribution business at the time of various expenditures. Appx. C-21 to -23. The district court found as a fact, however, that petitioner had at least $50,000 in legitimate assets at the time he put $15,000 into the down payment, and that, for example, he received generous gifts and loans from his father. What the court below counted as "probable cause" was therefore, as to at least some part of the value of the real property, nothing more than suspicion. In this

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respect, despite lip service to the proposition that mere suspicion is insufficient, the opinion below conflicts with those of two other circuits. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 639-40 (1st Cir. 1988) (where down payment was clean but later mortgage payments were tainted, only interest acquired as result of later payments was forfeitable); accord, United States v. One 1980 Rolls Royce, 905 F.2d 89 (5th Cir. 1990) (applying same concept to forfeiture of land and cars).[16] Based on

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16. The 1980 Rolls Royce decision errs, however, in holding that the government can meet its intitial probable cause determination as to the whole of a property by showing that any part can be traced to proceeds, and that the burden is on the claimant to exculpate some part of the property. See 905 F.2d at 92. To the contrary, probable cause means reasonable grounds to believe that the proposition which the government must demonstrate -- here, traceability to proceeds -- is true; thus, the burden shifts in a § 881(a)(6) case only as to that part of the property as to which the government establishes probable cause for belief in traceability to the proceeds of

the statutory requirement that the property to be forfeited be "traceable" to proceeds, those cases, unlike the decision below, recognize that there must be probable cause to believe the entirety of an item is forfeitable in order to shift the burden with respect to the entire item; otherwise, the government has met its initial burden with respect to part of the value only.

This is especially clear with respect to the Keough account. Petitioner invested $69,633 in that account, some 62% of the total, after the end of the period when the respondent's evidence showed him to have been in the drug business. Nevertheless, on the sole basis that the total amount paid in was less than the maximum amount petitioner

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an exchange for a controlled substance.

could have made in marijuana trafficking, the district court ordered the entire account forfeited. Appx. C-23 to -24. To justify the complete forfeiture of the Keough account, the district court misconstrued and misapplied Judge Newman's thoughtful decision in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), which merely suggests mechanisms for determining what money is forfeitable after commingling in a bank account. The district court here wrongly held that "[o]nce the Government has established probable cause linking some funds in an account to illegal drug transactions, the burden will then be on the claimant to demonstrate that no portions of the account can be linked to drugs." Appx. C-25.[17] The appellate

17. The decision below is inconsistent with the analogous Fourth Amendment cases, as well. It is as if an officer executing a search warrant, seeing in plain view what he or she has probable

decision below does not even suggest a legal basis for affirming the taking of petitioner's entire retirement account.

In this case, there was not remotely probable cause to believe that the post-1984 deposits were "traceable" to drug proceeds, only a possibility. In their enthusiasm to enlist as soldiers in the "drug war," the lower courts abandoned all semblance of adherence to the limits of statutory language in applying § 881(a). See also United States v. One Single Family Residence, 933 F.2d 976 (11th Cir. 1991) (extreme "ink drop"[18]

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cause to believe is contraband, would then be justified in seizing other items in the vicinity as to which there was no probable cause. See Horton v. California, 496 U.S. 128, 110 L.Ed.2d 112, 123 & n.7 (1990).

18. So called in the leading treatise's highly critical discussion of this case; see D. Smith, supra, ¶4.03[4][a], at 4-67; referring to the saying that one cannot remove a drop of ink from a glass of milk.

misapplication of § 881(a)(6)). This Court should grant certiorari to demonstrate the analytical technique demanded by the Congressional formula, and to reject the cavalier approach adopted below.

For this reason as well, this Court should grant the writ of certiorari and reverse the judgment below, remanding for a determination of the extent that the petitioner Walynetz's current interest in the petitioner properties was not shown to be probably traceable to proceeds of any drug transactions.

CONCLUSION

For the foregoing reason, the petitioners pray that this Court grant their petition for a writ of certiorari to review the judgment and memorandum opinion of the United States Court of Appeals for the Third Circuit affirming the order of forfeiture of petitioner Walynetz's entire interest in the petitioner properties.

Respectfully submitted,

PETER GOLDBERGER
JAMES H. FELDMAN, JR.
PAMELA A. WILK
Attorneys for Petitioner

Of Counsel:
ROBERT E. MADDEN

September 22, 1992.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2078

UNITED STATES OF AMERICA,

v.

ONE PARCEL OF REAL PROPERTY LOCATED AT:
456 CAFFERTY ROAD, TINICUM TOWNSHIP,
BUCKS COUNTY PENNSYLVANIA, AND ALL
IMPROVEMENTS AND APPURTENANCES THEREON,
AND
ANY AND ALL PROCEEDS FROM THE SALE OF THE
AFORESAID ASSETS; MARK A. WALYNETZ;
BUCKS COUNTY BANK AND TRUST COMPANY;
ONE KEOUGH ACCOUNT/CERTIFICATE OF DEPOSIT
IN THE NAME OF MARK A. WALYNETZ AT
BUCKS COUNTY BANK (& TRUST) COMPANY

MARK A. WALYNETZ,
Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 89-8896)
District Judge: Hon. Charles R. Weiner

BEFORE: GREENBERG, NYGAARD and WEIS,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record for the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit Rule 12(6) on June 15, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered October 23, 1991 be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

s/Sally Mrvos
Clerk

Dated: JUN 24 1992

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-2078

UNITED STATES OF AMERICA,

v.

ONE PARCEL OF REAL PROPERTY LOCATED AT:
456 CAFFERTY ROAD, TINICUM TOWNSHIP,
BUCKS COUNTY PENNSYLVANIA, AND ALL
IMPROVEMENTS AND APPURTENANCES THEREON
and
ONE KEOUGH ACCOUNT/CERTIFICATE OF DEPOSIT
IN THE NAME OF MARK A. WALYNETZ
AT BUCKS COUNTY BANK (& TRUST) COMPANY
and
ANY AND ALL PROCEEDS FROM THE SALE
OF THE AFORESAID ASSETS,

CLAIMANT MARK A. WALYNETZ,
Appellant

On Appeal from the
United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 89-8896)
District Judge: Hon. Charles R. Weiner

Submitted Under Third Circuit Rule 12(6)
on June 15, 1992

BEFORE: GREENBERG, NYGAARD and WEIS,
Circuit Judges

(Opinion Filed August 6, 1992)

AMENDED MEMORANDUM OPINION

NYGAARD, Circuit Judge

This is a civil forfeiture action brought by the United States of America under 21 U.S.C. § 881(a)(6) and (7) against appellant's house and his Keough account.[1] Mark A. Walynetz, appellant, filed a claim for the return of the property. Following a trial before the district court, sitting without a jury, a judgment of forfeiture was entered in favor of the United States. Walynetz appeals. We will affirm.

1. The claimant was found guilty of possession of marijuana in 1974 in Margate, New Jersey and given a conditional discharge; in 1980 he was found guilty of a drug related offense in Bangkok, Thailand, where he was adjudged guilty and recieved a three month suspended sentence and a $500 fine. The government has not filed any criminal charges against Mr. Walynetz in connection with this forfeiture action.

I.

The government presented evidence that Walynetz derived all or most of his income during the years 1979 through 1984 by importing and distributing marijuana. The government presented evidence that claimant purchased the house along with his partner in the drug trade, created a front corporation to launder drug proceeds, and made significant improvements to the house and large contributions to the Keough account. A witness against Walynetz was Robert Broff, Walynetz' partner in the drug trade for five years.

The district court concluded that the government met its burden of establishing probable cause to forfeit the assets. District Court's Memorandum and Order at 11-14 (DCMO). Walynetz produced anecdotal evidence of legitimate business

ventures purporting to account for his income during the critical period. Nonetheless, Walynetz was unable to produce any documents to support these businesses' income, and could not legitimately account for the large income he claimed during this period. The district court concluded that Walynetz failed to meet his burden of proving that the house and the Keough account were acquired through a legitimate source of money.

II.

On appeal, Walynetz makes three arguments. First, he claims that the government did not meet its burden of showing probable cause for forfeiture because it did not show that the house was purchased and the Keough account was funded with money directly traceable to drug transactions. Second, he claims that his evidence of legitimate business

ventures sufficiently rebutted the government's showing of probable cause for forfeiture. Last, he claims that the district court erred by its finding of fact number 34, describing the alleged use of an accountant to falsify tax returns for this period. Each of the arguments are without merit.

Walynetz' first argument, that the government must first show that assets subject to forfeiture are directly traceable to illegal drug transactions, is contrary to the law of this circuit. The claimant would impose upon the government the burden of showing the actual drug transactions from which the assets subject to forfeiture were derived. But we have held to the contrary:

> In determining whether proceeds are traceable to drug transactions, '[t]here is no need to tie the [property] to proceeds of a particular identifiable elicit

> [sic] drug transaction. (citation omitted.)

In determining whether probable cause exists for forfeiture,

> all that is required is that a court be able to look at the 'aggregate' of the facts and find reasonable grounds to believe that the property probably was derived from drug transactions. (Citation omitted.)

United States v. A Parcel of Land Known as 92 Buena Vista Avenue, 937 F.2d 98, 104 (3rd Cir. 1991).

Thus, under the drug forfeiture statute, 21 U.S.C. § 881, the government is only required to show a reasonable ground for belief that there was an unlawful drug transaction and a substantial connection between the transaction and the property subject to forfeiture. The government's showing may be based on less than prime facie proof, but more than mere suspicion. In light of the

substantial evidence presented by the government of Walynetz' drug involvement (including marijuana transactions of up to 7,000 pounds per shipment) the district court did not err by finding a substantial connection between his elicit [sic] drug activity and the house he purchased and the Keough account he funded.

Next, Walynetz challenges the district court's conclusion that he did not rebut the government's evidence that the properties were subject to forfeiture. This is patently without merit. In the face of substantial evidence that he had millions of dollars of income from drug sales during the period between 1979 and 1986, Walynetz presented little evidence of legitimate sources of income.

His rebuttal case consisted of five witnesses, two persons having business

dealings with Walynetz, two family members, and an accountant who reviewed his tax returns for the period in question. Of these witnesses, none testified to specific amounts or dates of transactions, and none provided documentary support for the extent of business dealings with Walynetz. The district court specifically found that Walynetz provided no evidence or records to support his claims of legitimate sources of income. DCMO p.7.

Walynetz offered the testimony of his accountant to establish that he had up to 2.8 million dollars of income available during the period in question, based upon Walynetz' tax returns and purported business records. But the government elicited on cross-examination that the accountant's analysis of records provided by Walynetz' attorney (which

were not produced by the defendant at trial) was not based on the accuracy of the returns and records. In essence, the accountant was merely asked to determine the amount of Walynetz' income during the seven-year period, not the source. The court did not err by concluding that Walynetz did not meet his burden of rebutting the government's forfeiture case.

Finally, Walynetz claims that the district court abused its discretion by admitting the affidavit of an FBI agent because it contained hearsay. The substance of the hearsay was that the affidavit described conversations between Walynetz and Robert Broff about an accountant who was skilled at falsifying income tax returns. It is clear from the district court's memorandum opinion that

the court properly admitted the documents for a limited purpose.

The district court did not abuse its discretion by admitting it. The government may establish probable cause for forfeiture by hearsay evidence. United States v. Parcel of Real Property Known as 6109 Grubb Road, 886 F.2d 618 (3rd Cir. 1989). There we held:

> [B]ecause the question of whether the government has established probable cause to seek forfeiture depends not upon the admissibility of evidence upon which the government relies, but upon the legal sufficiency and reliability of the evidence, [claimant] cannot challenge the use of deposition testimony as impermissible hearsay as to the issue of probable cause.

886 F.2d at 621.

But this rule only extends to the limited scope of the government's probable cause. When the burden shifts to the claimant for rebuttal, the government must independently establish its

[sic] admissibility of the hearsay statements if it intends to offer them in response to the claimant's claim. Id. 886 F.2d at 622.

It is clear from the district court's memorandum that the affidavit was admitted and used for the limited purpose of establishing the threshold question of probable cause. The court's analysis of Walynetz' rebuttal case did not mention the affidavit or any facts alleged in it. Indeed, the court's analysis was based upon the lack of credible evidence offered by Walynetz' own witnesses. DCMO p.14-15.

III.

In sum, based upon the foregoing, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/R. Nygaard
Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:		
VS.	:	C.A. NO. 89-8896
ONE PARCEL OF REAL PROPERTYLOCATED AT: 456 CAFFERTY ROAD TINICUM TOWNSHIP, BUCKS COUNTY PENNSYLVANIA, AND ALL IMPROVEMENTS AND APPURTENANCES THEREON:	:	
AND	:	
ONE KEOUGH ACCOUNT/ CERTIFICATE OF DEPOSIT IN THE NAME OF MARK A. WALYNETZ AT BUCKS COUNTY BANK (& TRUST) COMPANY:	:	
AND	:	
ANY AND ALL PROCEEDS FROM THE SALE OF THE AFORESAID ASSETS	:	

WEINER, J. OCTOBER 22, 1991

MEMORANDUM OPINION AND ORDER

On December 15, 1989, the United States instituted this civil forfeiture proceeding, pursuant to 21 U.S.C. §

881(a)(6), (7). Amendments to the complaint were filed on February 20, 1990[2] and June 19, 1990. The property sought to be forfeited is a parcel of residential real estate located at 456 Cafferty Road, Tinicum Township, Pennsylvania, a keough [sic] account on deposit at Bucks County Bank and any proceeds from the sale of these assets. Mark Allen Walynetz has filed a claim for the return of the property and an answer to the complaint for forfeiture. Also filing a claim was Bucks County Bank and Trust Company. Its claim alleges that it extended two lines of credit to Walynetz in the form of demand notes secured by first and second mortgages on the

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2. Although the pleading was correcty stamped "received" on February 7, 1990, the Clerk of Court incorrectly "file" stamped the pleading as filed on February 20, 1989.

Cafferty Road property. The matter was tried to the court. Our findings of fact, which include the parties' stipulated facts, and conclusions of law follow.

FINDINGS OF FACT

1. The defendant real property identified as the premises known as 456 Cafferty Road, Tinicum Township[,] Bucks County, Pennsylvania, is a parcel of real property with all of the improvements and appurtenances thereon which is currently deeded in the name of Mark Walynetz.

2. The defendant real property was first acquired by Robert Broff and Mark Walynetz on September 26, 1980.

3. The purchase price of the defendant real property at that time was $117,000.00.

4. Robert Broff and Mark Walynetz obtained the defendant property with a

down payment of $30,000.00 and a mortgage of $83,000.00 from the Hatboro Federal Savings and Loan Association.

5. Claimant Mark Walynetz made the initial payments for the Cafferty Road property in part with the following checks on the following dates:

7/30/80	$1,000.00
8/8/80	$5,450.00

6. The defendant property was deeded in the name of a Pennsylvania Corporation, Renew Inc.

7. A Certificate of Incorporation was issued for Renew Inc. by the Pennsylvania Department of State on August 5, 1980.

8. Robert Broff was president of Renew Inc.; Broff's wife Andrea was the corporate secretary. Together, they owned 50% of the stock. Mark Walynetz

owned the other 50% and was the corporation vice-president.

9. During the period from October of 1980 to early 1982, Broff and Walynetz made some improvements to the property including work on one of the floors and work on some cabinets.

10. Broff and Walynetz each contributed about 50% to the costs of these improvements.

11. Walynetz paid the Broff's $50,000.00 for their interest in Renew Inc. during the period from late 1981 to early 1982.

12. On January 29, 1982, Walynetz requested that Hatboro Savings release the Broffs from any further obligation on the mortgage for the property and on that date Hatboro granted the request.

13. At the time of this transaction the only significant asset owned by Renew

Inc. was the property at 456 Cafferty Road.

14. Following his purchase of the Renew Inc. stock, Walynetz paid for goods, services and equipment to rebuild and renovate the property.

15. Walynetz hired Lynn Taylor Associates to perform architectural services. Walynetz paid Lynn Taylor Associates $17,294.06. The first payment Walynetz made, $7,126.30, was paid in cash.

16. Walynetz hired John Ament to perform carpentry and roofing. He paid Ament between $4,000 and $6,000 for preliminary roofing work before the renovations began. This payment was in cash. Ament then performed major renovation work at the Cafferty Road property between Fall 1982 and Summer 1983. He received $125,208.00 for his services.

Ament was paid in cash by Walynetz. Payments were made every two weeks in amounts ranging from $5,000 to $10,000. The cash was delivered in an envelop[e], bag or tennis can. Ament was never requested by the government to produce deposit records to substantiate his testimony.

17. Walynetz hired Superior Wood Craft, Inc. to supply and install kitchen equipment and cabinets at Cafferty Road. Walynetz paid Superior $24,171.21. Upon delivery of the materials, Walynetz paid Superior $5,000 in cash. Walynetz made a second cash payment to Superior of $7,000.

18. In June, 1991, Walynetz visited the offices of Superior and asked Christian Geiger, Superior's president to destroy documents relating to his

payments and tell the Government that the payments were made by check.

19. On March 30, 1984, Walynetz applied for a $100,000 home equity loan, offering the Cafferty Road property as collateral. Bucks County Bank and Trust would not extend the loan unless the property was in Walynetz's name, rather than the corporate name. On April 16, 1984, Walynetz caused a deed to be recorded with the Bucks County Register of Deeds transferring the property from the name of Renew Inc. to Mark A. Walynetz. Walynetz was extended a $100,000 home equity loan by the Bank.

20. On February 16, 1988, Walynetz applied for a business line of credit with Bucks County Bank and Trust Company. Following a review of Walynetz['s] financial statements and tax returns, the Bank extended a $200,000 line of credit,

secured by a second position lien on 456 Cafferty Road.

21. On May 10, 1989, Walynetz requested and received an increase in his line of credit to $250,000. At all times relevant hereto, Bucks County Bank and Trust Company followed its standard policy in reviewing Walynetz's loan applications. It was a good faith lender and is an innocent lien holder.

22. The defendant Keough account was originally opened with Butcher and Singer and was later transferred to Bucks County Bank and Trust Company. Walynetz made the following deposits to the Keough account:

Tax Year	Date	Check No.	Amount
1981	6/28/82	412	$11,307.92
1982	4/3/83	215	$13,398.00
1983	4/16/83	317	$15,000.00
1984	6/26/84	340	$ 3,224.00
1984	4/10/85	101	$11,776.00

1985	3/17/86	110	$ 5,000.00
1985	3/17/86	701	$ 5,000.00
1985	4/1/86	706	$ 2,000.00
1985	6/15/86	739	$ 3,000.00
1986	4/14/86	104	$11,000.00
1987	3/30/88	958	$16,857.00
1988-89	4/31/89		$15,000.00 wire transfer

23. In interrogatories and at his deposition, Walynetz invoked his rights under the Fifth Amendment to the United States Constitution and refused to give any specific information regarding the sources of his income.

24. Walynetz has answered the Government's request for the production of documents relating to his alleged sources of income by responding that he has no documents responsive to the Government's request.

25. Robert David Broff was Walynetz['s] partner in Renew Inc. Broff was also Walynetz's partner in a marijuana

distribution business from 1979 to 1984. The partnership bought marijuana on consignment, initially receiving shipments of 50 to 100 pounds two to three times each month. In 1980, they began to buy marijuana in large shipments, receiving two shipments ranging from 700 to 1,000 pounds. They also received two such shipments in 1981 and 1982. In 1983, they received one shipment of 4,000 to 6,000 pounds. In 1984, they received one shipment of 8,000 pounds. The partnership's profits averaged $10 to $50 per pound, depending on the market, which Broff and Walynetz split evenly between themselves.

26. Based upon the evidence adduced at trial, each partner's minimum income from drug activities between 1979 and 1984 was $87,000. Each partner's maximum

income from these activities was $590,000.

27. For the years 1979 through 1984, drug sales were Broff's primary source of income. He has been tried, convicted and imprisoned for violating the federal drug laws.

28. Walynetz's portion of the deposit on 456 Cafferty Road came from his personal checking account. The balance due at settlement came from the account of Renew Inc.

29. Broff sold Walynetz his 50% interest in Renew Inc. for $50,000. Payment was made by three checks drawn on Walynetz's personal checking account. Walynetz told Broff he borrowed the money from his father.

30. Daniel Ring was an employee of a marijuana distribution business owned by Ken Lit. He delivered marijuana to

Robert Broff. The deliveries were made to country houses in Bucks County. Payments were made at Lit's house. Deliveries were always made to Broff. Ring recalled that Walynetz was present at one delivery. In May 1987, Ring pled guilty to one count of interstate drug trafficking and agreed to cooperate with the Federal Bureau of Investigation. Ring testified he told the FBI about Walynetz. However, Walynetz's name does not appear in the FBI Form 302 containing Ring's information.

31. Walter Walynetz, Mark Walynetz's father, loaned or gave his son money on several occasions beginning in 1980. In 1980 he gave his son thirteen cans of silver coins whose face value was $5,400. The fair market value of the silver was $15 per ounce. In 1982, he loaned or gave his son $21,000. In 1985

he loaned his son $80,000. In 1988 he gave his son the check he received from the sale of his principle [sic] residence, as an investment in 456 Cafferty Road. (The amount of this check was never placed in evidence.)

32. Peter Walynetz, Mark Walynetz's brother, was involved with his brother in the various businesses. From 1985 to 1988, they were in the used car business. Mark Walynetz was also involved in a business on South Street in Philadelphia called Grumbles. Grumbles was a used clothing store. Walynetz sold his interest in Grumbles in 1979 for $50,000. Walynetz also sold hot tubs, buying wooden tanks for $50 apiece and selling them for several thousand dollars. Walynetz bought and sold two properties in 1989, each for a sale price of $143,500. In 1987, Walynetz performed

promotional services for a hair salon. He was paid $5,000.

33. Augustine J. Manson, a certified public accountant, was qualified at trial as an expert witness. He reviewed Walynetz's income tax and bank records for the period 1977 through 1988. The purpose of his review [was] to ascertain what funds were available for Walynetz's use during these years. His testimony was to the gross amounts available to Walynetz, without any deduction for loan repayments, business expenditures or even personal expenses. The amounts he testified to included income from businesses, as ascertained from tax returns adding back depreciation, as well as loans and gifts Walynetz received during this period. He testified that Walynetz had the following amounts available:

YEAR	GROSS AMOUNT AVAILABLE
1977	$ 26,996
1978	$ 38,604
1979	$ 50,352
1980	$132,356
1981	$ 77,650
1982	$171,896
1983	$136,959
1984	$412,177
1985	$209,491
1986	$107,413
1987	$613,716
1988	$869,165

It was Manson's opinion that Walynetz had available the cumulative total $2,846,775.00 for the period 1977-1988. These figures are not the product of a certified audit conducted in accordance with established accounting principles. Rather they are based upon Walynetz's unaudited income tax records and several undocumented loans received by Walynetz from his father. Manson offered no

opinion on the reliability of the information contained in the tax records.

34. Broff introduced Walynetz to Isaac Abrah[a]ms, his accountant. Broff told FBI Special Agent Albert Sproul[e] that Walynetz used Abrah[a]ms to create the appearance that Walynetz's funds had a legitimate source. This Finding is based upon hearsay statements contained in Agent Sproul[e]'s affidavit, which was offered into evidence by the Government.

CONCLUSIONS OF LAW

1. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

2. Venue in this District is appropriate pursuant to 28 U.S.C. § 1391(b) and 21 U.S.C. § 881(j).

3. 21 U.S.C. § 881(a) provides in part

> The following shall be subject to forfeiture to the United States

and no property right shall exist in them:

. . .

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange

. . . .

(7) All real property, including any right, title and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment.

. . .

4. In a civil forfeiture proceeding, the Government must first meet its burden of showing probable cause for the seizure of the property. United States v. Property Known as 6109 Grubb Road, 886 F.2d 618, 621 (3d Cir. 1989); United States v. $55,518.05 in U.S. Currency, 728 F.2d 192 (3d Cir. 1984).

5. Probable cause is defined as a reasonable ground for belief in guilt. Grubb Road, 886 F.2d at 621; Ted's Motors v. United States, 217 F.2d 777 (8th Cir. 1954).

6. Probable cause may be established by hearsay testimony. Grubb Road, 886 F.2d at 621.

7. The test for determining the presence of probable cause for forfeiture is similar to that for arrests, searches and seizures: the Government must show a reasonable ground for belief that there was an unlawful exchange of controlled substances and, in the case of forfeiture of proceeds, that there was a substantial connection between that exchange and the property so that the drug proceeds are traceable into the property. The belief must be more than mere suspicion but can be created by less than prima facie

proof. United States v. Premises Known as 2639 Meetinghouse Road, 633 F.Supp. 979, 986 (E.D.PA. 1986), citing, United States v. $93,685.61 in U.S. Currency, 730 F.2d 571, 572 (9th Cir. 1984).

8. In determining whether proceeds are traceable to drug transactions, there is no need to tie the property to proceeds of a particular drug transaction. In determining whether probable cause exists for forfeiture, all that is required is that a court be able to look at the aggregate of the facts and find reasonable ground to believe that the property was derived from drug transactions. United States v. A Parcel of Land Known as 92 Buena Vista Avenue, 937 F.2d 98, 104 (3d Cir. 1991).

9. Once the Government satisfies its burden of establishing probable cause to believe that property is subject to

forfeiture, a burden then arises on the claimant to demonstrate by a preponderance of the evidence that the property was not used or acquired in violation of the drug laws. Specifically, the claimant has the burden of demonstrating that the asset was acquired with an alternate[,] legitimate source of funds. United States v. $215,300 in U.S. Currency, 882 F.2d 417, 420 (9th Cir. 1989).

10. The Government has satisfied its burden of showing that probable cause exists to believe that 456 Cafferty Road was acquired with proceeds from drug transactions and that such proceeds were invested in the defendant property. This conclusion is based upon the following evidence:

a. Walynetz was involved in the drug distribution partnership with

Broff at the time the property was acquired, September 26, 1980.

b. Walynetz was involved in the drug distribution partnership with Broff at the time he purchased Broff's interest in Renew Inc. and 456 Cafferty Road.

c. Walynetz was involved in the drug distribution partnership with Broff at the time he paid for the major renovation work at the Cafferty Road property between Fall 1982 and Summer 1983.

d. Substantial portions of the payments made to the contractors who performed the renovation work on 456 Cafferty Road were made in cash. This included the $125,208.00 paid to John Ament for his services.

e. Broff's sole source of income at the time the property was acquired

was his income from the drug partnership. Broff's portion of the investment in 456 Cafferty Road was therefore the proceeds of drug transactions.

11. The Government has satisfied its burden of showing that probable cause exists to believed that the defendant Keough account is traceable to proceeds from drug transactions and that such proceeds were invested in the defendant Keough account. This conclusion is based upon the following evidence:

a. The deposits to the Keough account attributable to tax years 1981 through 1984 were made at the time Walynetz was involved in the drug distribution partnership with Broff.

b. The total deposits to the Keough account attributable to tax years

1981 through 1989 are less than the maximum amount the evidence showed Walynetz grossed from [the] drug distribution partnership.

12. Mark A. Walynetz has failed to meet his burden of demonstrating that 456 Cafferty Road was acquired and improved with an alternate[,] legitimate source of funds. Walynetz has offered no reasonable explanation for his use of large sums of cash to pay the contractors who worked on the property, and has failed to identify where he obtained the cash. He has also failed to identify the source of his deposit, down payment and payments to Broff for 456 Cafferty Road, other than that checks were drawn from his personal account.

13. Mark A. Walynetz has failed to meet his burden of demonstrating that the defendant Keough account was acquired

with an alternate[,] legitimate source of funds. Once the Government has established probable cause linking some funds in an account to illegal drug transactions, the burden will then be on the claimant to demonstrate that no portions of the account can be linked to drugs. United States v. Banco Cafetero Panama, 797 F.2d 1154, 1160-61 (2nd Cir. 1986). It is not sufficient that Walynetz was involved in other business ventures during and after the time he was involved in drug trafficking or that he had income from sources other than the proceeds of drug trafficking. Rather, it is incumbent upon a claimant to state with specificity a legitimate source for all the funds on deposit in the account. Walynetz has failed to offer any evidence that the figures contained in his unaudited tax returns, upon which CPA

Manson based his opinions, contained true and accurate information. It is also permissible for the court to draw negative inferences from Walynetz's failure to respond to the government's request for information and documents regarding his other sources of income. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them). Based on these factors, we find Walynetz has failed to meet his burden regarding the Keough account.

14. Claimant Bucks County Bank and Trust Company has established by a preponderance of the evidence that it is an innocent and good faith lien holder in the 456 Cafferty Road property.

15. Judgment of forfeiture will be entered in favor of the United States as regards the defendant Keough account. Judgment of forfeiture will be entered in favor of the United States, subject to the interests of Bucks County Bank and Trust Company, as regards the defendant 456 Cafferty Road property.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA:		
VS.	:	C.A. NO. 89-8896
ONE PARCEL OF REAL PROPERTYLOCATED AT: 456 CAFFERTY ROAD TINICUM TOWNSHIP, BUCKS COUNTY PENNSYLVANIA, AND ALL IMPROVEMENTS AND APPURTENANCES THEREON:	:	
AND	:	
ONE KEOUGH ACCOUNT/ CERTIFICATE OF DEPOSIT: IN THE NAME OF MARK A.: WALYNETZ AT BUCKS COUNTY: BANK (& TRUST) COMPANY:	:	
AND	:	
ANY AND ALL PROCEEDS FROM THE SALE OF THE AFORESAID ASSETS	:	

ORDER

Judgment of forfeiture is hereby ENTERED in favor of the United States of America and against claimant Mark A. Walynetz.

Judgment is entered in favor of claimant of Bucks County Bank and Trust Company and against the United States of America.

Claimant Bucks County Bank and Trust Company's interests in defendant One Parcel of Real Property Located At: 456 Cafferty Road[,] Tinicum Township, Bucks County[,] Pennsylvania, and All Improvements and Appurtenances Thereon is ADJUDGED not to be subject to forfeiture to the United States of America.

Claimant Mark A. Walynetz['s] interest in defendant One Parcel of Real Property Located At: 456 Cafferty Road[,] Tinicum Township, Bucks County[,] Pennsylvania, and All Improvements and Appurtenances Thereon is FORFEITED to the United States of America, subject to the interests of Claimant Bucks County Bank and Trust Company.

Claimant Mark A. Walynetz['s] interest in defendant One Keough Account/Certificate of Deposit in the Name of Mark A. Walynetz at Bucks County Bank (& Trust) Company is FORFEITED to the United States of America.

IT IS SO ORDERED.

s/Charles R. Weiner
CHARLES R. WEINER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-2078

UNITED STATES OF AMERICA

vs.

ONE PARCEL OF REAL PROPERTY, etc.

MARK A. WALNETZ, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is O R D E R E D that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until September 22, 1922[.]

s/R. Nygaard
Circuit Judge

Dated: AUG 6 1992